

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JAMES L. LEMMONS**

Claimant

VS.

**RYDER INTEGRATED LOGISTICS, INC.**

Self-Insured Respondent

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Docket No. 1,036,335

**ORDER**

Claimant appealed the March 1, 2012, Post-Award Medical award entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Board heard oral argument on June 15, 2012, in Wichita, Kansas.

**APPEARANCES**

Robert R. Lee of Wichita, Kansas, appeared for claimant. Randall W. Schroer of Kansas City, Missouri, appeared for respondent.

**RECORD AND STIPULATIONS**

The record considered by the Board is listed in the March 1, 2012, Post-Award Medical award. The Board also considered the June 15, 2009, regular hearing transcript; the March 23, 2010, post-award hearing transcript; and the pleadings contained in the administrative file.

**ISSUES**

In the March 1, 2012, Post-Award Medical award, ALJ Barnes determined respondent was not liable for payment of an outstanding medical bill from Wesley Medical Center (Wesley) for emergency room treatment incurred on May 21 and 22, 2008. The account number on the bill is 27069041 and the bill has total charges of \$9,959.78. ALJ Barnes found an ALJ is without authority to award benefits for medical treatment incurred more than six months before an application for post-award medical benefits.

Claimant requests the Board reverse the ALJ's Post-Award Medical award and order respondent to pay the outstanding medical expense. Conversely, respondent requests the Board affirm the Post-Award Medical award, arguing: (1) the medical care was

unauthorized, (2) claimant failed to submit the medical bills at any hearing or deposition before the entry of the September 2009 Award, and (3) the ALJ lacks authority to award claimant reimbursement or payment of the medical expense because claimant received the medical treatment before the entry of the award for compensation and more than six months before filing his application for post-award medical benefits.

The issues to be determined are:

1. Was the Wesley medical bill an authorized medical expense?
2. If the Wesley medical bill is an authorized medical expense, does an ALJ in a post-award medical award have authority to order payment of a medical expense that was incurred prior to the original award?
3. If so, does the ALJ have authority to order respondent to pay a medical expense incurred more than six months before claimant filed his Application for Post Award Medical?

#### **FINDINGS OF FACT**

After reviewing the record and considering the parties' briefs and arguments, the Board finds and concludes:

Claimant suffered a severe spinal injury on July 28, 2007. At the regular hearing the parties extensively discussed with ALJ Barnes the issue of medical bills. The ALJ indicated respondent had already paid \$84,674.29 in medical bills and that there was ongoing medical compensation.<sup>1</sup> The Wesley bill that is the subject of this post-award medical proceeding was not part of the \$84,674.29. It appears from the statements of counsel at the regular hearing that the only medical bills in issue were pharmacy and medical mileage overpayments by respondent. Claimant did request future medical. Following the regular hearing, SALJ Seth G. Valerius issued an Award on September 29, 2009. A Nunc Pro Tunc Award, also dated September 29, 2009, was issued by the SALJ and filed on October 15 or 23, 2009.<sup>2</sup> The Nunc Pro Tunc Award, which was approved by both parties, does not order payment of claimant's authorized medical expenses. The payment of past authorized medical expenses was not specifically ordered in the Nunc Pro Tunc Award. However, it did state future medical benefits would be awarded upon proper application to and by approval of the Director.

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<sup>1</sup> R.H. Trans. at 6.

<sup>2</sup> The SALJ's Nunc Pro Tunc Award is stamped as received by the Division of Workers Compensation on October 15 and 23, 2009.

The Pre-Trial Stipulations form used by the ALJ asked whether any medical or hospital treatment had been furnished. In response, the parties indicated "\$84,674.29 and ongoing."<sup>3</sup>

Claimant filed several previous applications for post-award medical benefits. On March 8, 2010, claimant filed an Application for Post Award Medical that requested payment of two medical bills claimant incurred at Wesley Medical Center with discharge dates of May 10 and 22, 2008. Medical bills attached to the application were for \$198.80 in account number 27069041 and \$335.80 in account number 27007683. Subsequent post-award medical awards were issued by ALJ Barnes on August 25, 2010, and November 1, 2010, but they do not mention the aforementioned Wesley bills.

On January 13, 2011, ALJ Barnes issued another post-award medical award.<sup>4</sup> One of the issues at a March 23, 2010, post-award medical hearing was whether respondent should be required to pay a Wesley medical bill in the approximate amount of \$4,600.00 for services rendered on May 10, 2008, and reimburse claimant's payment of \$50.00 toward the same bill. Respondent had objected to the bills on the ground of lack of foundation. In the January 13, 2011, post-award medical Award, the ALJ denied payment of the bills because claimant failed to provide foundation for the admission of the bills into the record.

Respondent's brief indicates claimant's Application for Post Award Medical was filed on December 24, 2009. Claimant's brief does not mention the date of his Application for Post Award Medical. Nor was the application date mentioned during the September 22, 2011, post-award medical hearing. The ALJ's March 1, 2012, Post-Award Medical award states claimant's application for post-award benefits was filed in 2011. Claimant filed an Application for Post Award Medical on December 21, 2010, requesting payment of a medical bill from Wesley with a copy of the bill attached. The Wesley bill has an account number of 27069041 and charges totaling \$9,959.78 for treatment provided to claimant on May 21 and 22, 2008. The bill shows a billing date of June 26, 2010.

At the September 22, 2011, post-award medical hearing, ALJ Thomas Klein inquired of the parties whether the post-award hearing was to be treated more like a preliminary hearing or a regular hearing with terminal dates. Claimant's attorney thought the ALJ needed to set terminal dates. The ALJ agreed and set terminal dates for the parties.

At the September 22, 2011, post-award medical hearing, claimant requested payment of the aforementioned \$9,959.78 Wesley medical bill. Respondent objected to

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<sup>3</sup> Pre-Trial Stipulations (Mar. 30, 2009) at 2.

<sup>4</sup> It appears the post-award medical Award was signed by ALJ Thomas Klein for ALJ Nelsonna Potts Barnes.

the request for payment of the Wesley medical bill in part because respondent believed the bill had been addressed in a prior post-award medical hearing and subsequent January 13, 2011, post-award medical Award, wherein ALJ Barnes denied payment of a Wesley medical bill due to lack of foundation. Claimant argued the Wesley medical bill ALJ Barnes denied was a different Wesley medical bill in the amount of \$4,600.00, not the \$9,959.78 Wesley medical bill. Respondent then withdrew its objection that payment of the \$9,959.78 bill had been previously addressed in the prior post-award medical hearing and in the January 13, 2011, post-award medical Award. As indicated above, a review of the March 23, 2010, post-award medical hearing transcript indicates the bill at issue was indeed a \$4,600.00 medical bill for services rendered to claimant on May 10, 2008, at Wesley.

With regard to the Wesley medical bill that is the subject of this proceeding, claimant testified he was not sure whether it was for services he received before the original Award was entered. Claimant did not know if the Wesley medical bill was submitted at a preliminary hearing or at the regular hearing as part of the original Award.

Claimant's wife, Rita Lemmons, testified that since the accident that gave rise to his claim, claimant has endured total-body spasms. When claimant has a total-body spasm, his neck pain becomes very severe. He describes the spasm as a charley horse that runs through his body. Claimant cries and then becomes quiet. Ms. Lemmons usually could deal with claimant's spasms without the necessity of seeking medical treatment.

On May 21, 2008, claimant had a total-body spasm and he went to the emergency room at Wesley. At the time claimant had no in-home care, other than that provided by his wife. Ms. Lemmons was not certain if she took claimant to the emergency room or whether he went by ambulance. Claimant was kept overnight at Wesley. According to Ms. Lemmons this was to try and get the pain under control and to figure out what was causing the severity of the spasms. Ms. Lemmons testified she never received the Wesley medical bill in question. Claimant testified that he currently lives at the same address in Wichita, Kansas, that he lived at on the date he was originally injured. While questioning Ms. Lemmons at the September 22, 2011, post-award medical hearing, claimant's attorney indicated the first record he had of the bill was April 4, 2011. Ms. Lemmons acknowledged that the medical bill was for medical services rendered before June 2009. The record does not reflect whether the bill was sent to respondent by Wesley or when respondent first saw it.

Joey Dean, Director of Risk Management at Wesley, was deposed by claimant. She testified that claimant incurred a medical bill at Wesley for services rendered on May 21 and 22, 2008, in the amount of \$9,959.78. There was an adjustment of \$1,594.17. The reason for the adjustment is not in the record. Ms. Dean testified that the patient made a \$25.00 payment on the account. It appears that payment was made on July 29, 2008. An \$895.20 payment from United Healthcare Choice was credited to the account on June 23, 2008, leaving a balance due and owing of \$7,445.41. There is nothing in the record to

indicate why United Healthcare Choice paid the \$895.20. Ms. Dean testified the bill had not been reduced or audited under the Kansas Fee Schedule. Ms. Dean was not asked on what date the bill was sent to claimant, respondent or its claims adjustor. The Wesley medical bill lists a billing date of June 26, 2010, and indicates it was billed to claimant's home.

At the September 22, 2011, post-award medical hearing, respondent indicated it was not procedurally correct to file an application for post-award medical asking respondent to pay a medical bill that occurred prior to the original Award. In its post-award submission brief, respondent also contended claimant's medical treatment on May 21 and 22, 2008, was unauthorized and claimant's request for payment of the Wesley medical bill was barred because the treatment was more than six months before claimant filed his Application for Post Award Medical. Respondent requested attorney fees pursuant to K.S.A. 44-536(a).

Claimant states in his brief to the Board:

In this case, the medical treatment was incurred prior to the entry of the original award. An application for post-award medical was filed to force respondent to pay for that treatment and there is no statutory language contained within the workers compensation act which would prevent the administrative law judge from ordering the payment of treatment incurred prior to the entry of the original award.<sup>5</sup>

The ALJ determined claimant's medical expenses incurred on May 21 and 22, 2008, at Wesley Medical Center were reasonable and necessary expenses incurred to treat claimant's work-related injuries and, therefore, were authorized medical expenses. ALJ Barnes concluded she did not have authority to award benefits for medical treatment incurred more than six months prior to the Application for Post Award Medical.

#### **PRINCIPLES OF LAW AND ANALYSIS**

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>6</sup> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."<sup>7</sup>

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<sup>5</sup> Claimant's Brief at 2 (filed Mar. 15, 2012).

<sup>6</sup> K.S.A. 2007 Supp. 44-501(a).

<sup>7</sup> K.S.A. 2007 Supp. 44-508(g).

Here, the parties proceeded under K.S.A. 2007 Supp. 44-510k, which states in pertinent part:

(a) At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523 and amendments thereto. **The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award.** No post-award benefits shall be ordered without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551 and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556 and amendments thereto.

(b) Any application for hearing made pursuant to this section shall receive priority setting by the administrative law judge, only superseded by preliminary hearings pursuant to K.S.A. 44-534a and amendments thereto. The parties shall meet and confer prior to the hearing pursuant to this section, but a prehearing settlement conference shall not be necessary. **The administrative law judge shall have authority to award medical treatment relating back to the entry of the underlying award, but in no event shall such medical treatment relate back more than six months following the filing of such application for post-award medical treatment.** Reviews taken under this section shall receive priority settings before the board, only superseded by reviews for preliminary hearings. A decision shall be rendered by the board within 30 days from the time the review hereunder is submitted. (Emphasis added.)

The facts surrounding the billing of claimant's May 21 and 22, 2008, medical expenses are opalescent. The records contain no evidence as to when Wesley sent the medical bill in question to claimant, respondent or respondent's claims adjustor. The billing date listed on the bill is June 26, 2010, but Ms. Dean was not asked when Wesley first sent claimant the bill. Pursuant to K.A.R. 51-9-10(a), Wesley should have sent the medical bill to respondent or its claims adjustor forthwith or if treatment was ongoing, sent a bill every 60 days. At the September 22, 2011, post-award medical hearing, claimant's attorney indicated the first record he had of the bill was April 4, 2011. That is contradicted by claimant's December 21, 2010, Application for Post Award Medical, which has the Wesley bill in question attached. In its brief, respondent asserts claimant's Application for Post Award Medical was filed on December 24, 2009. It is undisputed, however, that the medical treatment was incurred by claimant over a year prior to the regular hearing, and 16 months prior to the original Award.

Claimant's wife testified that for several years claimant has suffered from total-body spasms. They start with severe pain in his neck that runs into his back, arms and legs. Claimant feels as though he has a charley horse running through his body. On May 21, 2008, claimant had a total-body spasm and was taken to the Wesley Medical Center emergency room. Wesley tested claimant and attempted to find the cause of his total-body spasms.

A similar issue regarding a similar medical treatment procedure was addressed in the recent case of *Thompson*,<sup>8</sup> wherein the Kansas Court of Appeals stated:

Although K.S.A. 2010 Supp. 44-510h(a) establishes an employer's general duty to provide medical care for an injured employee, there is no provision requiring an employer or an employer's insurance carrier to pay for the medical expenses incurred solely at the employee's discretion. To the contrary, K.S.A. 2010 Supp. 44-510h(b)(2) states:

"Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total amount of \$500." K.S.A. 2010 Supp. 44-510h(b)(2).

... The Act makes no other provision for emergency treatment other than to charge the first \$500 of such treatment to the employer under K.S.A. 2010 Supp. 44-510h(b)(2). Consequently, the Board erred, as a matter of law, in authorizing compensation for the unauthorized hospital bill in excess of the \$500 limit provided by K.S.A. 2010 Supp. 44-510h(b)(2).

The Board feels compelled by the language of the Kansas Court of Appeals in *Thompson* to reverse the ALJ and find the Act makes no provision requiring an employer or its insurance carrier to pay as authorized medical the medical expenses incurred solely at the employee's discretion.

Because the Board anticipates an appeal of this claim to the Kansas Court of Appeals, the Board considers it prudent to consider all the issues raised by claimant and respondent.

The Board finds no statutory authority requiring a respondent in a post-award medical proceeding to pay a medical expense incurred prior to the original Award, but not submitted for payment until after the Award was entered. Case law is not helpful as neither party nor the Board could find a previous case with facts and issues identical to this one.

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<sup>8</sup> *Thompson v. Hasty Awards, Inc.*, No. 106,359, 2012 WL 1970241 (Kansas Court of Appeals unpublished opinion filed May 25, 2012).

Accordingly, the Board agrees with ALJ Barnes and finds there is no authority to require respondent to pay a medical expense that claimant failed to submit as evidence or make an issue of prior to the Award.

ALJ Barnes found she had no authority to order payment of the Wesley medical bill, as the treatment occurred more than six months prior to claimant's Application for Post Award Medical. Claimant's medical treatment was on May 21 and 22, 2008, some 17 months before he filed his first Application for Post Award Medical on October 28, 2009. The Board, mindful of the requirements of K.S.A. 2007 Supp. 44-510k(b), concurs with ALJ Barnes. In *Roles*,<sup>9</sup> the Kansas Court of Appeals stated, "K.S.A. 2009 Supp. 44-510k(b) makes it clear that an ALJ is without authority to award a claimant benefits for medical treatment incurred more than 6 months prior to an application for post-award medical compensation. The statute includes no explicit exception for medical expenses ordered or performed by the authorized physician."

The Board understands and empathizes with claimant. However, the hands of the Board are tied by the facts in this matter, statutory law and case law. After the Nunc Pro Tunc Award was entered, claimant or claimant's attorney received a Wesley medical bill dated June 26, 2010, for medical treatment claimant received on May 21 and 22, 2008. The Nunc Pro Tunc Award contains no provision requiring respondent to pay authorized medical bills. Moreover, the Kansas Court of Appeals in *Thompson* has ruled as a matter of law that if an injured employee undergoes emergency medical treatment, the treatment will be deemed unauthorized unless respondent or its insurance carrier gives prior approval. The Board can think of an endless stream of scenarios where an injured employee might need emergency treatment and yet, due to circumstances, find it impossible to get prior authorization from respondent or its insurance carrier. Even if claimant's medical treatment of May 21 and 22, 2008, was authorized, K.S.A. 2007 Supp. 44-510k does not give the ALJ authority to require respondent to pay claimant's medical expenses.

### CONCLUSION

1. The May 21 and 22, 2008, Wesley medical bill was not addressed in the original award and was not an authorized medical expense.
2. Even if the Wesley medical bill was an authorized medical expense, the ALJ in a post-award medical award does not have authority to order payment of a medical expense incurred by claimant prior to the original Award.
3. The ALJ does not have authority to order payment of a medical expense incurred more than six months before claimant filed his Application for Post Award Medical.

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<sup>9</sup> *Roles v. Boeing Co.*, 43 Kan. App. 2d 619, 638, 230 P.3d 771 (2010).



**WHEREFORE**, the Board modifies the March 1, 2012, Post-Award Medical award entered by ALJ Barnes by concluding claimant's medical expenses were not authorized. The Board also modifies the Post-Award Medical award by finding ALJ Barnes did not have authority to order that respondent pay medical expenses claimant incurred prior to the entry of the Award, but presented for payment after the award. The Board affirms the ALJ's Post-Award Medical award in all other respects, including the ALJ's finding that she lacked authority to order payment of the Wesley medical bill in question as it was incurred more than six months prior to claimant's Application for Post Award Medical.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July, 2012.

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BOARD MEMBER

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BOARD MEMBER

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